

**United States Department of Labor
Employees' Compensation Appeals Board**

V.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer**

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**Docket No. 11-1827
Issued: May 10, 2012**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 2, 2011 appellant, through her attorney, filed a timely appeal from the June 28, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) which affirmed the termination of her compensation benefits. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether OWCP properly terminated appellant's compensation and medical benefits effective December 1, 2010.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that OWCP issued a January 12, 2012 merit decision on appellant's reconsideration request from the June 28, 2011 OWCP decision. As appellant filed her appeal with the Board on August 2, 2011, OWCP's January 12, 2012 decision is null and void as it pertains to the same issue over which the Board has jurisdiction; *see Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

FACTUAL HISTORY

This case has previously been before the Board.³ In a September 26, 2011 decision, the Board affirmed a September 17, 2010 OWCP decision denying appellant's claim for a schedule award. The Board found that the medical evidence did not establish that she had permanent impairment of the left arm causally related to her accepted cervical sprain or her left rhomboid sprain. The facts and history contained in the prior appeal are incorporated by reference.

Appellant returned to work on May 21, 2007 in a full-time limited-duty capacity but continued to miss work intermittently for which she received wage-loss compensation.

On May 19, 2010 OWCP referred appellant for a second opinion examination with Dr. Robert Orlandi, a Board-certified orthopedic surgeon. In a June 7, 2010 report, Dr. Orlandi described appellant's history and physical examination. He found no evidence of derangement of the left shoulder, elbow or wrist. Dr. Orlandi opined that appellant did not have any musculoskeletal disability in the left arm. He noted that he would examine the cervical spine separately. In a July 12, 2010 addendum, Dr. Orlandi examined appellant's cervical spine and noted her symptoms of paresthesias in the lateral arm and radial forearm and digits one and two of the left hand. His examination revealed no abnormality in the resting posture. Cervical lordosis was a normal 40 degrees and there was no fixed paraspinal spasm. Appellant had excellent cervical range of motion, no evidence of a myofascial sprain of the right or left upper trapezius and no trapezial or upper extremity symptoms. There was no swelling or tenderness of the anterior musculature, deep tendon reflexes were normal "2+" and symmetric in the biceps, triceps and brachioradialis (C3, C6 and C7). Appellant had normal sensation in the arms and normal strength including the interossei, the wrist extensors, the finger extensors, elbow flexors, elbow flexors and shoulder abductors on the right and left (C8 to C4). Dr. Orlandi diagnosed resolved cervical and shoulder strains. He explained that a cervical magnetic resonance imaging (MRI) scan revealed only a small central disc herniation that did not contact the thecal sac. Dr. Orlandi advised that there was no nerve root or foraminal impingement and there was a normal lordosis. He opined that his examination showed that appellant had a remarkably good and pain-free cervical range of motion, the upper extremity reflexes were normal as was sensation and motor function. Dr. Orlandi opined that no further treatment was warranted and there was no musculoskeletal disability. He advised that appellant could return to her normal work activities. In an August 24, 2010 addendum, Dr. Orlandi reiterated that she had no disability and the cervical spine did not contribute to the left shoulder and left elbow strains, which had resolved.⁴

On October 28, 2010 OWCP proposed to terminate appellant's compensation benefits based on the report of Dr. Orlandi, who found no disability or residuals of the work injury of May 16, 2007. Appellant was given 30 days to submit additional evidence or argument.

³ Docket No. 11-211 (issued September 26, 2011).

⁴ Effective July 21, 2010, appellant was placed on the periodic rolls as the employing establishment had no work available within her restrictions.

In a November 8, 2010 report, Dr. Cleon Waite, a chiropractor, advised that appellant was under his care for injuries sustained on the job. He indicated that she received physical therapy in October and November.

Appellant provided several reports from Dr. Nagaveni Rao, a Board-certified physiatrist. On July 26, 2010 Dr. Rao indicated that appellant was not working and that she had neck and left arm pain. She advised that appellant was sometimes unable to turn her head to the left and had left thumb and index finger numbness, pain in the left side of the neck and tingling in the fingers. Dr. Rao noted similar findings on September 27, 2010. In a November 19, 2010 report, she noted that appellant's history included presenting on September 10, 2007 with left-sided neck pain after sustaining injuries on the job on May 16, 2007. Appellant indicated that she had intermittent pain when lifting, in damp weather and in the mornings. The pain radiated down the left arm with numbness around the thumb and index finger. Dr. Rao noted appellant's 2004 work injury, involving a sprained left shoulder, and a 2005 electromyography (EMG) scan that revealed C6 radiculopathy and a 2005 MRI scan that showed a disc bulge. She noted findings on prior examinations and advised that on the most recent examination of November 10, 2010 appellant had pain which was 5/10 that radiated along the fingers. Dr. Rao noted that active range of motion of the cervical spine and shoulder was limited. She diagnosed cervical radiculopathy at C5-C6 and C8-T1 and myopathy affecting muscles of the left shoulder including biceps, deltoid and muscles of hand namely interosseous. Dr. Rao opined that appellant's symptoms and diagnostic findings were related to her accident on May 16, 2007. She advised that appellant could only work with limitations such as limited lifting, with no more than 3 to 5 pounds and no pushing, or pulling more than 5 to 10 pounds. Dr. Rao indicated that appellant continued to suffer from neck and left shoulder pain with minimal improvement. She opined that appellant sustained a permanent disability which was work related.

OWCP received physical therapy notes and a March 30, 2009 MRI scan from Dr. Shelley Wertheim, a Board-certified diagnostic radiologist, who diagnosed a C4-5 small central disc herniation, mild effacement of the subarachnoid space and a C3-4 mild disc bulge. A March 18, 2010 EMG scan read by Dr. Amran Weiner, a chiropractor, diagnosed radiculopathy on the left C5 and C6 with axonal loss, denervation and reinnervation, radiculopathy on the left C8 and probably T1 with axonal loss, denervation and reinnervation, and myopathy progressing in the left deltoid, biceps and first dorsal interosseous. Dr. Weiner advised that appellant had multiple levels of cervical radiculopathy affecting foremost the median nerve sensory fibers.

In a December 1, 2010 decision, OWCP terminated appellant's compensation benefits effective that date finding that appellant had no disability or residuals of her employment injury.

On December 7, 2010 appellant's representative requested a hearing, which was held on April 12, 2011. At the hearing, appellant contended that Dr. Orlandi saw her twice, but did not examine her or look at the medical evidence that she brought. In reports dated October 11 and 23, 2010, Dr. Waite diagnosed left shoulder pain resulting from C4-5 radiculopathy and recommended physical therapy. OWCP also received an October 1, 2010 functional capacity evaluation (FCE), together with EMG reports from 2006 which demonstrated cervical radiculopathy with no disc herniation. A May 2006 EMG test result advised of possible cervical radiculopathy.

In a December 3, 2010 report, Dr. Sebastian Lattuga, a Board-certified orthopedic surgeon, diagnosed cervical spine radiculopathy, sprain and a herniated nucleus pulposus (HNP) and recommended anterior cervical discectomy and fusion. In a December 16, 2010 report, he repeated his previous findings and advised that appellant refrain from activities such as heavy lifting, carrying or bending. On January 28, 2011 Dr. Lattuga noted that appellant was asymptomatic prior to her work injury and was symptomatic since the accident. He stated that appellant remained severely symptomatic and recommended limited duty with restrictions.

A December 16, 2010 cervical spine MRI scan from Dr. Satish Chandra, a Board-certified internist, revealed left paracentral disc herniation indenting the left lateral margin of the thecal sac at C3-4 and straightening of the cervical spine. Dr. Chandra indicated that it could be due to muscle spasm. In a February 1, 2011 right shoulder MRI scan, he diagnosed arthropathy of the acromioclavicular joint, subacromial bursitis, biceps synovitis and distal rotator cuff tendinopathy. On March 21, 2011 Dr. Joshua Dines, a Board-certified orthopedic surgeon, advised that appellant was currently under his care for a shoulder and rotator cuff tear. He indicated that appellant could return to limited-duty work and listed restrictions.

In a February 24, 2011 report, Dr. Andrew Lim, a Board-certified internist, advised that appellant's pain began at work on February 4, 2011 while pulling and pushing equipment that weighed between 200 and 340 pounds. He advised that, since the initial onset, the magnitude of the pain had increased. Dr. Lim stated that diagnostic tests showed a small herniation at C4-5 and a mild disc bulge at C3-4 and C5-6. He diagnosed cervical degenerative disc disease with radiculopathy and myofascial pain. A March 15, 2011 addendum noted that "the patient states the injury occurred date should be March 16, 2007 not February 4, 2011 which was a typographical error."

In a March 21, 2011 report, Dr. Jeffry Goldstein, a Board-certified orthopedic surgeon, noted that appellant presented for follow up and her pain had improved. He examined appellant and determined that she had good range of motion of her shoulders, elbows and wrist without motor deficit in the extremities. Dr. Goldstein found limited range of motion in the cervical spine. He noted that MRI scan films of the cervical spine from March 15, 2011 demonstrated "multilevel disc degenerative changes without evidence of significant canal stenosis or neural foraminal narrowing at any visualized level." Dr. Goldstein diagnosed resolving left upper extremity cervical radiculitis and advised that surgery was not recommended. He also noted findings and diagnosed cervical radiculopathy in reports dated February 14 and 24, 2011.

By decision dated June 28, 2011, OWCP's hearing representative affirmed the December 1, 2010 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁵ Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the

⁵ *Curtis Hall*, 45 ECAB 316 (1994).

employment.⁶ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁷ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁸

In assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value, and its convincing quality. The opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested, and the medical rationale expressed in support of the physician's opinion are facts which determine the weight to be given each individual report.⁹

ANALYSIS

OWCP accepted that appellant sustained several a cervical sprain on May 16, 2007 and a left rhomboid sprain on December 9, 2004. It paid benefits and subsequently referred appellant to Dr. Orlandi for a second opinion evaluation.

Dr. Orlandi reviewed appellant's history of injury and treatment, and examined appellant. On June 7, 2010 he found no left shoulder abnormality and an essentially normal left arm examination. Dr. Orlandi determined that sensation and motor function were intact, that there was no epicondylitis and the left shoulder had full and painless range of motion. He concluded that appellant did not establish any left arm abnormality and no disability in the left arm. On July 12, 2010 Dr. Orlandi examined appellant's cervical spine. There was no abnormality in the resting posture, with normal cervical lordosis and no fixed paraspinal spasm. Appellant had excellent cervical range of motion, no evidence of a myofascial sprain. She had normal sensation in the upper extremities and normal strength. Dr. Orlandi opined that the cervical and shoulder strains had resolved. He explained that diagnostic testing revealed a small central disc herniation. However, it did not contact the thecal sac, and there was no nerve root or foraminal impingement and normal lumbar lordosis. Dr. Orlandi determined that appellant had a remarkably good and pain-free cervical range of motion, normal upper extremity reflexes, normal sensation and motor function. He opined that no further treatment was warranted, there was no musculoskeletal disability and she could return to her normal work activities. On August 24, 2010 Dr. Orlandi determined that appellant had no disability. He found no basis on which to attribute any condition or disability to the accepted injuries.

Appellant provided several reports from Dr. Rao, who noted that her most recent examination showed cervical radiculopathy at C5-6 and C8-T1 and myopathy affecting the left shoulder muscles. She opined that appellant's symptoms and findings were related to the May 16, 2007 injury. The Board notes the conditions diagnosed by Dr. Rao were not accepted

⁶ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁷ *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

⁸ *Calvin S. Mays*, 39 ECAB 993 (1988).

⁹ *See Connie Johns*, 44 ECAB 560 (1993).

conditions. The only conditions which were accepted by OWCP include a left rhomboid sprain and a cervical sprain. Dr. Rao did not explain how the diagnosed conditions were related to the work injuries nor did she specifically explain how any of the accepted conditions remained symptomatic or disabling.¹⁰ Medical reports not containing rationale on causal relation are entitled to little probative value.¹¹ In her July 26 and September 27, 2010 reports, Dr. Rao did not specifically address whether appellant was disabled or had residuals of the accepted cervical sprain and a left rhomboid sprain.

In a January 28, 2011 report, Dr. Lattuga noted that appellant was asymptomatic before her work injury and was symptomatic after it. A medical opinion that states that a condition is causally related to a work injury because the employee was asymptomatic before the injury but symptomatic after is insufficient, without supporting rationale, to show causal relationship.¹² In his December 3 and 16, 2010 reports, Dr. Lattuga listed diagnoses and restrictions but he did not specifically address whether any of the diagnosed conditions were due to the accepted work injuries. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹³

In a February 24, 2011 report, Dr. Lim diagnosed cervical degenerative disc disease with radiculopathy and myofascial pain and advised that appellant's pain began on February 4, 2011 at work while pulling and pushing postal equipment that weighed between 200 and 340 pounds. A March 15, 2011 addendum noted that appellant reported that the injury date should be March 16, 2007. Dr. Lim provided no medical rationale to explain why any particular continuing condition was caused by the March 16, 2007 injury. Also, as noted, the only conditions accepted by OWCP were a cervical sprain and a left rhomboid sprain. Thus Dr. Lim reports are of limited probative value.

The record also contains several reports from Dr. Goldstein. These reports are insufficient to support a continuing work-related condition as the physician did not offer an opinion to explain how any diagnosed condition or disability was related to the accepted injuries. Similarly Dr. Dines' March 21, 2011 is of limited probative value as the physician did not specifically address whether appellant's continuing symptoms were attributable to the accepted work injuries. OWCP also received several diagnostic test reports. However, these reports merely reported findings and did not contain an opinion regarding the cause of any diagnosed condition.

Appellant also provided reports from Dr. Waite, a chiropractor, who noted treating appellant for job injuries and a March 18, 2010 EMG report from Dr. Weiner, a chiropractor, who diagnosed radiculopathy. In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is a physician as defined under 5 U.S.C. § 8101(2). A

¹⁰ See *Jaja K. Asaramo*, 55 ECAB 200 (2004) (for a condition not accepted by OWCP as due to an employment injury, the claimant has the burden of proof to establish that the condition is causally related to the work injury).

¹¹ *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

¹² *Id.*

¹³ *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

chiropractor is not considered a physician under FECA unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist.¹⁴ Drs. Waite and Weiner did not diagnose a spinal subluxation demonstrated by x-ray.¹⁵ In the absence of a diagnosis of subluxation based on x-rays, the chiropractors are not considered to be physicians under FECA. These reports have no probative value.¹⁶ Additionally, the record also contains physical therapy notes. Health care providers such as nurses, acupuncturists, physician's assistants and physical therapists are not physicians under FECA. Thus, their opinions on causal relationship do not constitute rationalized medical opinions and have no weight or probative value.¹⁷

Because Dr. Orlandi provided the only rationalized medical opinion of record addressing whether appellant continued to have residuals of her accepted employment injuries; his opinion constitutes the weight of the medical evidence. Dr. Orlandi provided a reasoned medical opinion based upon a complete examination and an accurate factual and medical history. The Board finds that Dr. Orlandi's report established that appellant ceased to have any disability or condition causally related to her employment injuries, thereby justifying OWCP's December 1, 2010 termination of compensation benefits.

Appellant may submit evidence or argument with a written request for reconsideration within one year of this merit decision pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP met its burden of proof in terminating appellant's compensation benefits effective December 1, 2010.

¹⁴ *Mary A. Ceglia*, 55 ECAB 626 (2004).

¹⁵ OWCP's implementing federal regulations define subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on x-ray. See 20 C.F.R. § 10.5(bb).

¹⁶ *Michelle Salazar*, 54 ECAB 523 (2003).

¹⁷ *Jane A. White*, 34 ECAB 515, 518 (1983).

ORDER

IT IS HEREBY ORDERED THAT the June 28, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 10, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board